Bukit Hitam Development Sdn Bhd v Han Joke Kwang & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCvC-802–07 OF 2012
YEOH WEE SIAM J
30 AUGUST 2013

Damages — Claim for — Land — Surrender of land titles — Cancellation of surrender of lands — Assignment with contractual fee to ensure cancellation of surrender of the Lands and for beneficial and registered ownership of lands — Company later wound up — Claim for quit rent, assessment and other expenses, interests, general damages and costs — Claim based on fraud in equity, constructive trust, unjust enrichment — Allegations of misrepresentation — Whether there was constructive trust, unjust enrichment, total failure of consideration and negligence

The plaintiff was a developer while the first defendant ('D1') and second defendant ('D2') were directors of Khidmat Ikhtiar Sdn Bhd, an investment and consulting services company ('the company'). In 1997, the plaintiff submitted an application in Form 12B under s 200 of the National Land Code ('the NLC') to the Pejabat Daerah dan Tanah Petaling, Selangor ('PDTP') to surrender the titles of several lands, including the five lands in this case. In 2000, the plaintiff filed another application in Form 12A under s 197 of the NLC to surrender nine titles of land, including the same five lands to the PDTP. The plaintiff's head office was not aware of the plaintiff's previous applications for surrender of the lands, or did not keep track of the matter. The Subang Jaya Municipal Council ('MPSJ') gave notice to the plaintiff's head office and asked for the surrender of five pieces of land. However, the plaintiff was desirous to retain its ownership of the five lands for development purposes. The plaintiff, on the recommendation of D1, was introduced to the managing director of the company. The company, through D1 and/or other agents of the company, as a special consultant, agreed to undertake the assignment ('the assignment') given by the plaintiff which required the company, inter alia, in return for a contractual fee of RM7,096,872.60 to be paid by the plaintiff to the company, to ensure the cancellation of the surrender of the five lands and that the plaintiff would have beneficial and registered ownership of the five lands. Via official title searches of the five lands and a letter purportedly from Pengarah Tanah dan Galian Selangor ('PTGS'), the company informed the plaintiff that the company had fulfilled entirely its obligations as a special consultant to the plaintiff under the assignment, and asked for the full agreed fees of RM7,096,872.60 to be paid. The plaintiff informed D1 that it would like the titles of the five lands to be registered in the name of the plaintiff 'upon

your successful completion of the assignment'. The plaintiff then made full payment to the company. MAB forwarded certified true copies of the five titles to the five lands to the plaintiff. The plaintiff later discovered that the five lands were actually part of the original titles that were to be surrendered and pursuant to such application, the registration of the surrender of the five lands/five titles was finally done by the relevant authorities and/or PTGS. The company was voluntarily wound up by the defendants in 2010. The plaintiff filed this action against the defendants for the sum of RM7,096,872.60, consequential losses amounting to RM2,277,420.51 for payment of quit rent, assessment and other expenses, interests, general damages and costs, based on fraud in equity; misrepresentation; constructive trust; unjust enrichment; total failure of consideration; and negligence.

Held, allowing the claim in part:

(1) There was not a single iota of evidence adduced by the plaintiff to prove D2's personal involvement and liability for the causes of action pleaded. While there was proof that D2 did sign the statement by the directors which purports to give a true and fair view of the state of affairs of the company, there was no evidence to show that D2 was personally involved, together with D1 and MAB, in procuring the assignment from the plaintiff, and misrepresenting to the plaintiff that the assignment was completed. There was no evidence that D2 had direct personal dealings with the plaintiff regarding the various causes of action pleaded by the plaintiff. Accordingly, the claim against D2 ought to be dismissed (see para 16).

(2) While there was no endorsement in the register of title of the five lands of the plaintiff's application for surrender of such lands and the approval, the fact was that for as long as the surrender of the five titles was not registered by the relevant authorities before 4 February 2008, the five titles remained registered under the ownership and name of the plaintiff. This fact, or the truth of the matter, was not communicated to the plaintiff by the company and/or D1 and/or MAB. Clearly, they are guilty of misrepresentation and fraud in equity and therefore liable to the plaintiff for collecting payment of full fees based on the assignment which had never been successfully undertaken, or had not been completed by the company and/or D1 and/or MAB in the first place (see paras 42–43).

(3) The plaintiff had adduced satisfactory cogent evidence of misrepresentation and fraud in equity by D1 and/or MAB. It certainly justified the lifting of the corporate veil of the company in order to now make D1 liable for the losses suffered by the plaintiff, more so because the directors have intentionally caused the company to be voluntarily wound up (see para 44).

(4) The court was unable to agree that since the full sum of fees were paid to the company, the defendants were constructive trustees to the plaintiff who was the beneficiary of such monies. The argument was rather artificial and too far-fetched, and could not be accepted. The evidence showed that the plaintiff paid the monies for the alleged successful undertaking of the assignment, and it was not a case of the defendants holding such payment or monies on trust for the plaintiff as beneficiary (see para 46).

(5) The plaintiff's claim based on the defendants' obligation to compensate the plaintiff for its losses for total failure of consideration could not be allowed. The contract for the assignment was entered between the plaintiff and the company, and not with the defendants. There was no privity of contract between the plaintiff and the defendants. As such, the plaintiff's claim could not be based on the cause of action for total failure of consideration of the contract for the reason that there was no such contract entered between the plaintiff and the defendants (see para 47).

(6) The claim by the plaintiff based on the cause of action for negligence could not be allowed on the rationale that there was no privity of contract between the plaintiff and the defendants since the contract was entered between the plaintiff and the company. As such, the defendants did not owe a contractual duty of care to the plaintiff. Therefore, the question of breach of duty of care through negligence did not arise (see para 48).

(7) The claim for quit rent could not be allowed because for as long as the plaintiff remained as the registered owner of the five lands prior to the registration of the surrender of the five lands by the relevant authorities on 4 February 2008, the quit rent had to be paid. Even the assessment had to be paid by the plaintiff, as owner, to the relevant authorities. Furthermore, there was no evidence adduced by the plaintiff that it had suffered any general damages as a result of the actions of the company and/or the defendants and/or MAB (see paras 49–50).

[Bahasa Malaysia summary

Plaintif adalah pemaju manakala defendan pertama ('D1') dan defendan kedua ('D2') adalah pengarah Khidmat Ikhtiar Sdn Bhd, sebuah syarikat pelaburan dan perundingan ('syarikat'). Pada tahun 1997, plaintif membuat satu permohonan dalam Borang 12B di bawah s 200 Kanun Tanah Negara ('KTN') di Pejabat Daerah dan Tanah Petaling, Selangor ('PDTP'), untuk menyerahhakan hakmilik beberapa bidang tanah, termasuk lima bidang tanah dalam kes ini. Pada tahun 2000, plaintif memfailkan satu lagi permohonan dalam Borang 12A di bawah s 197 KTN untuk menyerahakkan sembilan hakmilik tanah, termasuk lima bidang tanah yang sama kepada PDTP. Ibu pejabat plaintif tidak menyedari akan permohonan plaintif yang terdahulu untuk menyerahhakan tanah-tanah, atau tidak membuat susulan tentang

perkara itu. Majlis Perbandaran Subang Jaya ('MPSJ') memberikan notis kepada ibu pejabat plaintif dan meminta akan penyerahakkan lima bidang tanah tersebut. Walau bagaimanapun plaintif berhasrat untuk mengekalkan pemilikannya terhadap lima bidang tanah untuk tujuan pembangunan. Plaintif, atas anjuran D1, telah diperkenalkan kepada pengarah urusan syarikat. Syarikat itu, melalui D1 dan/atau ejen syarikat yang lain, sebagai perunding khas, bersetuju untuk melaksanakan penyerahhakan ('penyerahhakan') yang diberikan oleh plaintif yang mana memerlukan syarikat, antara lain, sebagai pulangan untuk fi kontraktual sebanyak RM7,096,872.60 dibayar oleh plaintif kepada syarikat, untuk memastikan pembatalan penyerahhakan lima bidang tanah dan bahawa plaintif akan mempunyai pemilikan benefisial dan berdaftar terhadap lima bidang tanah itu. Melalui carian hakmilik rasmi terhadap lima bidang tanah itu dan sepucuk surat yang dikatakan daripada Pengarah Tanah dan Galian Selangor ('PTGS'), syarikat memaklumkan plaintif bahawa syarikat telah menyempurnakan keseluruhan tanggungjawabnya sebagai perunding khas plaintif di bawah penyerahhakan, dan meminta fi penuh yang dipersetujui sebanyak RM7,096,872.60 dibayar. Plaintif memaklumkan D1 bahawa ia mahu hakmilik lima bidang tanah itu didaftarkan atas nama plaintif 'upon your successful completion of the assignment'. Plaintif kemudian membuat bayaran penuh kepada syarikat. MAB menghantar lima hakmilik salinan yang telah disahkan untuk lima bidang tanah kepada plaintif. Plaintif kemudiannya mendapati bahawa lima bidang tanah adalah sebenarnya sebahagian daripada hakmilik asal yang akan diserahhakan dan menurut permohonan sebegitu, pendaftaran penyerahhakan terhadap lima bidang tanah/atau lima hakmilik akhirnya dilakukan oleh pihak berkuasa yang berkaitan dan/atau PTGS. Syarikat secara sukarela telah digulungkan oleh defendan pada tahun 2010. Plaintif memfailkan tindakan ini terhadap defendan-defendan untuk jumlah RM7,096,872.60, kerugian turutan berjumlah RM2,277,420.51 untuk pembayaran cukai tanah, taksiran dan lain-lain perbelanjaan, faedah, ganti rugi am dan kos, berdasarkan fraud dan ekuiti; salah nyata; amanah konstruktif; keseluruhan kegagalan balasan; dan kecuaian.

Diputuskan, membenarkan sebahagian tuntutan:

(1) Tiada satu pun iota keterangan dikemukakan oleh plaintif untuk membuktikan pembabitan peribadi dan liabiliti D2 terhadap kausa tindakan yang diplidkan. Manakala terdapat bukti bahawa D2 menandatangani penyata pengarah yang mana bermaksud untuk memberikan pendapat yang benar dan adil tentang keadaan hal ehwal syarikat, tiada keterangan untuk menunjukkan bahawa D2 terlibat secara peribadi, bersama-sama dengan D1 dan MAB, dalam mendapatkan penyerahhakan daripada plaintif, dan melakukan salah nyata terhadap plaintif bahawa penyerahhakan telah lengkap. Tiada keterangan bahawa D2 mempunyai hubungan peribadi secara langsung

dengan plaintif berkenaan pelbagai kausa tindakan yang diplidkan oleh plaintif. Sewajarnya, tuntutan terhadap D2 patut ditolak (lihat perenggan 16).

(2) Walaupun tiada endorsmen di dalam pendaftaran hakmilik lima bidang tanah dalam permohonan plaintif untuk menyerahhak terhadap tanah sebegitu dan kelulusan, fakta adalah selama mana penyerahhakan lima hakmilik tidak didaftarkan oleh pihak berkuasa berkaitan sebelum 4 Februari 2008, kelima-lima hakmilik kekal didaftarkan di bawah pemilikan dan nama plaintif. Fakta ini, atau kebenaran perkara ini, tidak dimaklumkan kepada plaintif oleh syarikat dan/atau D1 dan/atau MAB. Ternyata, mereka bersalah melakukan salah nyata dan fraud dalam ekuiti dan oleh itu bertanggungan terhadap plaintif kerana mengambil bayaran fi penuh berdasarkan penyerahhakan yang mana tidak pernah berjaya dilaksanakan, atau tidak pernah dilengkapkan oleh syarikat dan/atau D1 dan/atau MAB asalnya (lihat perenggan 42–43).

(3) Plaintif telah mengemukakan keterangan yang menyakinkan terhadap salah nyata dan fraud dalam ekuiti oleh D1 dan/atau MAB. Ia jelas sekali menjustifikasikan menyingkap tabir permerbadanan syarikat untuk membuatkan D1 bertanggungan kepada kerugian yang dialami oleh plaintif, lebih-lebih lagi pengarah-pengarah secara sengaja telah menyebabkan syarikat digulungkan (lihat perenggan 44).

(4) Mahkamah tidak dapat bersetuju bahawa memandangkan seluruh fi telah dibayar kepada syarikat, defendan-defendan adalah pemegang amanah konstruktif kepada plaintif yang merupakan benefisiari untuk wang sebegitu. Hujahan itu adalah agak palsu dan terlalu dibuat-buat, dan tidak dapat diterima. Keterangan menunjukkan bahawa plaintif membayar wang tersebut untuk pelaksanaan penyerahhakan yang dikatakan berjaya itu, dan ia bukanlah kes defendan memegang bayaran atau wang atas amanah untuk plaintif sebagai benefisiari (lihat perenggan 46).

(5) Tuntutan plaintif berdasarkan tanggungjawab defendan-defendan untuk memampas plaintif akan kerugiannya untuk keseluruhan kegagalan balasan tidak boleh dibenarkan. Kontrak untuk penyerahhakan dimasuki antara plaintif dan syarikat, dan bukan dengan defendan-defendan. Tiada priviti kontrak antara plaintif dan defendan-defendan. Oleh itu, tuntutan plaintif tidak boleh berdasarkan kausa tindakan untuk keseluruhan kegagalan balasan atas sebab bahawa tidak terdapat kontrak sebegitu yang dimasuki antara plaintif dan defendan-defendan (lihat perenggan 47).

(6) Tuntutan oleh plaintif berdasarkan kausa tindakan untuk kecuaian tidak boleh dibenarkan atas rasional bahawa tiada priviti kontrak antara plaintif dan defendan-defendan kerana kontrak dimasuki antara plaintif

dan syarikat. Oleh itu, defendan tidak menanggung kwajipan berjaga-jaga terhadap plaintif. Oleh itu, persoalan pelanggaran kewajipan berjaga-jaga melalui kecuaian tidak timbul (lihat perenggan 48).

(7) Tuntutan untuk cukai tanah tidak boleh dibenarkan kerana selama mana plaintif kekal sebagai pemilik berdaftar lima bidang tanah sebelum pendaftaran penyerahhakan lima bidang tanah itu oleh pihak berkuasa berkenaan pada 4 Februari 2008, cukai tanah hendaklah dibayar. Taksiran juga hendaklah dibayar oleh plaintif, sebagai pemilik, kepada pihak berkuasa berkenaan. Tambahan lagi, tiada keterangan yang dikemukakan oleh plaintif ia telah mengalami apa-apa ganti rugi am akibat daripada tindakan syarikat dan/atau defendan dan/atau MAB (lihat perenggan 49–50).]

Cases referred to

Pamol (Sabah) Ltd & Anor v Joseph bin Paulus Lantip & Ors [2012] 5 MLJ 616, CA (refd)

Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533; [1997] 1 CLJ 529, FC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)

Legislation referred to

Companies Act 1965

National Land Code ss 197, s 197(3), 198(4), 200, Forms 12A, 12B

Ramesh Gopal (Joanna Thevathasan with him) (Rajes, Hisham Rahim & Gopal) for the plaintiff.

B E Teh (Teh & Assoc) for the defendants.

Yeoh Wee Siam J:

BRIEF FACTS

[1] The plaintiff is a developer. The first defendant ('D1') and second defendant ('D2') are directors of a company, Khidmat Ikhtiar Sdn Bhd ('the company'), an investment and consulting services company.

[2] In 1997 the plaintiff submitted an application in Form 12B under s 200 of the National Land Code ('the NLC') to the land office ie Pejabat Daerah dan Tanah Petaling, Selangor ('PTDP') to surrender the titles of several lands, including the five lands in this case (CBOD Pt C pp 1–4).

[3] On 29 September 2000, the plaintiff filed another application in Form

12A under s 197 of the NLC to surrender nine titles of land, including the same five lands, to the PTDP (CBOD Pt B Vol 1 p 65) (see also para 32 of the plaintiff's statement of claim ('SOC')). A

[4] Over the years, it appears that the plaintiff's head office was not aware of the plaintiff's previous applications for surrender of the lands, or did not keep track of the matter. B

[5] The Subang Jaya Municipal Council ('MPSJ') in their letter dated 4 May 2006 gave notice to the plaintiff's head office and asked for the surrender of five pieces of land as particularised in para 8 of the SOC ('the five lands' or 'the five titles'. as the case may be). C

[6] However, the plaintiff was desirous to retain its ownership of the five lands for development purposes. D

[7] D1 was introduced to the plaintiff for the job by his friend, Mr Heng. The plaintiff, on the recommendation of D1, was then introduced to Mohd Ali bin Hj Baharom ('MAB'), the managing director of the company. E

[8] The company, through D1 and/or other agents of the company, as a special consultant, agreed to undertake the assignment ('the assignment') given by the plaintiff which requires the company, inter alia, in return for a contractual fee of RM7,096,872.60 to be paid by the plaintiff to the company, to ensure the cancellation of the surrender of the five lands and that the plaintiff would have beneficial and registered ownership of the five lands (see plaintiff's letter dated 16 May 2006 appointing the company as special consultant in CBOD Pt B Vol 1 p 136). F

G

[9] By a letter dated 4 July 2006 from the company, signed by MAB as its managing director, enclosing, inter alia, official title searches of the five lands and a letter purportedly from *Pengarah Tanah dan Galian Selangor* ('PTGS') ('the PTGS letter') (CBOD Pt B Vol 1 p 159), the company informed the plaintiff that the company had fulfilled entirely its obligations as a special consultant to the plaintiff under the assignment, and asked for the full agreed fees of RM7,096,872.60 to be paid. H

[10] The plaintiff in its letter to D1 dated 6 July 2006 informed D1 that it would like the titles of the five lands to be registered in the name of the plaintiff 'upon your successful completion of the assignment'. I

[11] Thereafter, the plaintiff made full payment to the company vide its cheque dated 12 July 2006 (CBOD Pt B Vol 1 p 195).

[12] Later on, through a letter from the company dated 7 January 2008, MAB forwarded certified true copies of the five titles to the five lands to the plaintiff.

[13] Subsequently, on or around 10 October 2008, the plaintiff discovered, through an official title search, that the five lands were actually part of the original titles that were to be surrendered vide its application on 29 September 2000, and pursuant to such application, the registration of the surrender of the five lands/five titles was finally done by the relevant authorities and/or PTGS on 4 February 2008 (CBOD Pt B Vol 2 pp 309–318 and pp 319–320).

[14] The company was voluntarily wound up by the defendants in 2010.

THE PLAINTIFF'S CLAIM IN THE WRIT OF SUMMONS AND SOC

[15] The plaintiff is now suing the defendants for the sum of RM7,096,872.60, consequential losses amounting to RM2,277,420.51 for payment of quit rent, assessment and other expenses, interests, general damages and costs, based on the following various causes of action:

(a) fraud in equity;

(b) misrepresentation;

(c) constructive trust;

(d) unjust enrichment;

(e) total failure of consideration; and

(f) negligence.

Whether D2 is liable

[16] Regarding the plaintiff's claim against D2, the court finds that there is not a single iota of evidence adduced by the plaintiff to prove D2's personal involvement and liability for the causes of action pleaded. While there is proof that D2, being a Director of KISB, in the annual report and financial statements of 30 June 2008 and 30 June 2009 respectively of the company, did sign the statement by the directors which purports to give a true and fair view of the state of affairs of the company, there is no evidence to show that D2 was personally involved, together with D1 and MAB, in procuring the assignment from the plaintiff, and misrepresenting to the plaintiff that the assignment was completed. There is no evidence that D2 had direct personal dealings with the plaintiff regarding the various causes of action pleaded by the plaintiff. Accordingly, the claim against D2 ought to be dismissed.

Whether D1 is liable

[17] The first point of the defence is based on the doctrine of corporate personality, which is that the defendants, as directors, are not liable for the contract made between the plaintiff and the company. Therefore, there is no privity of contract between the plaintiff and the defendants in their personal capacity. As such, the defendants cannot be made personally liable to the plaintiff in this action.

[18] The plaintiff contended that the defendants, under the Companies Act 1965, as officers of the company, used the company and committed fraud in equity against the plaintiff, and caused the company to be voluntarily wound up knowing that the plaintiff had issues with, and a possible claim against the company. Therefore, the defendants can be held personally liable for the same.

[19] The evidence adduced by both parties show the following.

[20] Initially, D1 met with the plaintiff's board of directors to discuss the possibility of the assignment. He subsequently introduced MAB to the plaintiff. Both D1 and MAB first met the plaintiff's board of directors in their personal/individual capacity (see PW3-WS Q & A No 3–4 and pp 60–61 of notes of evidence ('NOE')). D1 and/or MAB represented to the plaintiff that they were able and competent to attend to the dealings with the relevant authorities to achieve the plaintiff's purpose regarding the cancellation of the surrender of the five lands, on the plaintiff's behalf (see PW3-WS Q & A No 7 and evidence of D1/DW1 at p 161 of NOE).

[21] It was D1 and/or MAB who agreed to undertake the assignment to recover the five lands for the plaintiff, even though ultimately the contract regarding the assignment was entered between the plaintiff and the company.

[22] It is trite law that the defendants cannot be made personally liable for the company's acts or omissions. However, exception to the application of the doctrine of corporate personality can be allowed in certain circumstance.

[23] In *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533; [1997] 1 CLJ 529 the Federal Court held:

> [2] The fundamental attribute of a corporate personality is that a corporation is a legal entity distinct from its members, be they individuals or corporate bodies. However, the development of the law has seen many deviations from the strict rule. In cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court will disregard the notional separateness of the companies.

[24] In *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, the Federal Court held:

> (11) Where there is a fraud, an agency relationship or if the company is a myth or fiction, the doctrine of corporate personality will not insulate the shareholders or directors from being assailed directly. A litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstance showing that the company in question is a mere facade concealing the true facts. Fraud includes equitable fraud. However, an intention to deceive — which is a necessary ingredient in common law fraud — is not an ingredient of equitable fraud, which is essentially unconscionable conduct in circumstances where there exists or is implied or imposed a relationship of trust or confidence ...
>
> (12) ... The doctrine of privity of contract had nothing to with the fact pattern here. Trusts are an exception to the common law rule of privity of contract ....

[25] Counsel for the defendants submitted that in the present case, the company's corporate veil cannot be lifted in order to make the defendants personally liable for the company's actions since the plaintiff did not plead the same in the SOC. He cited the Court of Appeal decision in *Pamol (Sabah) Ltd & Anor v Joseph bin Paulus Lantip & Ors* [2012] 5 MLJ 616 where Abdul Malik Ishak JCA stated at p 625:

> [20] However, ... there was a failure on the part of the six plaintiffs to particularise the plea that all the four defendants operated as a group enterprise constituting one single commercial unit as distinct from being separate legal entities. In this context, we refer to the case of this court in *ATA Management Consultants Sdn Bhd v Makmuran Sdn Bhd* [2004] 3 CLJ 53 (CA), a judgment of Gopal Sri Ram JCA (later FCJ). There at pp 57–58, His Lordship had this to say:
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> ... to cap it all, there was no plea taken before the learned judge that this was an appropriate case for the veil of incorporation to be lifted.

[26] Counsel for the defendants further submitted that the particulars of fraud have not been stated in the SOC in this case.

[27] It is true that the plaintiff did not plead in the SOC specifically the lifting of the corporate veil due to fraud by the defendants. However, after perusing the SOC thoroughly, the court finds that the whole thrust of the plaintiff's pleadings is that D1 and/or MAB, acting in the name of the company, had undertaken the assignment and caused the plaintiff to pay the full fees without ensuring that, at the end of the day, the plaintiff would be the registered owner of the five lands. The plaintiff pleaded, inter alia, misrepresentation, fraud in equity, breach of constructive trust and unjust enrichment by the defendants. The court is satisfied that on the whole, the

plaintiff's SOC, in particular paras 9(c), 13, 16, 18–20, 22–24, and 37–44, contain averments in detail on the various circumstances where D1 and/or MAB had allegedly committed misrepresentation and fraud in equity against the plaintiff. Such misrepresentation and fraud can create the exception to the doctrine of corporate personality and allow the lifting of the corporate veil in the interest of justice. Furthermore, the averments in the SOC are encapsulated by the pleadings in paras 14 and 16 of the plaintiff's reply which state that the corporate veil of the company has to be lifted in view of the defendants' attempt to avoid their contractual liability and responsibility which they had undertaken through the company. Paragraphs 14 and 16 of the plaintiff's reply did not set up a new cause of action, as submitted by counsel for the defendant. Instead, they merely summarise whatever is pleaded in the SOC and are therefore not in breach of the law on pleadings.

[28] The question now is whether there is in fact evidence of misrepresentation and fraud in equity by the defendants to require the lifting of the corporate veil of the company to make the defendants personally liable to the plaintiff for such acts.

Misrepresentation and fraud in equity; breach of constructive trust and unjust enrichment

[29] The whole thrust of the assignment is to 'recover' the five lands. D1 admitted that his understanding of this term is as per the plaintiff's SOC in para 10 (iii)(a) where it is stated that the plaintiff would have its interests secured ie to secure both the beneficial and registered ownership of the five lands/five titles in the plaintiff's name.

[30] When the company wrote the letter dated 4 July 2006 to the plaintiff, MAB claimed that the assignment was completed and wanted payment of the full fees. It is clear that at that point in time the assignment was not completed yet. That was why the plaintiff had to immediately write the letter dated 6 July 2006, addressed to D1 (CBOD Pt B Vol 1 p 189), requesting that the five lands be registered in the name of the plaintiff.

[31] Despite the fact that the company and the defendants and/or MAB had not yet secured the cancellation of the surrender of the five lands and then the subsequent registration of the plaintiff as the owner of the said lands, D1 responded to the plaintiff's letter of 6 July 2006 by a letter dated 6 July 2006, signed by him on behalf of the company, which letter had no company letterhead (CBOD Pt B Vol 1 p 190), and maintained that the plaintiff is the 'beneficiary owner' of whatever land the company has helped to recover. D1 then made reference to the letter from the PTGS letter which confirmed that

A the five lands are under the ownership of the plaintiff. Here again, D1 asked for full payment of their due fees from the plaintiff.

[32] From the evidence of Zabidah bt Awang ('PW6'), the deputy PTGS, the plaintiff established that the PTGS letter dated 28 June 2006 (CBOD Pt B Vol 1 p 178) referred to by MAB and D1 respectively is a non-existent letter. The letter is therefore probably a fabrication. D1 could not explain how MAB or he had obtained the PTGS letter and he claimed that MAB was the one who produced the letter. However, this does not relieve D1 from liability to the plaintiff since the evidence shows that D1 had at all times acted consistently with whatever MAB did for, or informed the plaintiff of, regarding the Assignment. At no time did D1 dissociate himself from MAB's dealings with the plaintiff.

[33] The plaintiff authorised the company to attend the meeting with MPSJ on 10 July 2006 (CBOD Pt B Vol 1 pp 191–194). On 10 July 2006, MAB attended the said meeting in MPSJ. In that meeting, based on the evidence of Hasnor bt Salwa ('PW7'), *Penolong Pengarah Kanan (Penilaian)* from MPSJ, MAB was clearly informed that the relevant authorities were not agreeable to a cancellation of the surrender of the five lands, and in fact were proceeding with the surrender of the five lands by the plaintiff. However, as submitted by counsel for the plaintiff, this information was suppressed, or withheld from the plaintiff. Neither the company, nor MAB or D1, informed the plaintiff of the matter. D1 admitted knowing about the meeting but claimed that he did not know and did not ask about the outcome of the meeting. This is highly improbable, and cannot be believed, since the company, through MAB, and later D1, claimed payment of the full fees by the plaintiff.

[34] Subsequently, the plaintiff followed up with D1 on the question of obtaining the titles to the five lands vide its letter dated 2 August 2006 (exh P1). D1 was informed of the plaintiff's surrender application in Form 12B regarding the five titles which had been submitted to the land office/PTDP in 1997 and enclosed the application (CBOD Pt C pp 1–4). Yong Yoong Fa ('PW1'), the Chief Operating Officer of the TAHPS Group Bhd, ie the holding company of the plaintiff, requested the defendant to attend to the matter and to keep them posted.

[35] Notwithstanding the above facts, MAB, through the letter of the company dated 7 January 2008 (CBOD Pt B Vol 1 pp 225) forwarded certified true copies of the titles to the five lands to the plaintiff, thereby causing the plaintiff to believe that the company and/or MAB and D1 had successfully completed the assignment.

[36] After the plaintiff's official search on the five lands, the plaintiff discovered that all the five titles to the five lands had been cancelled in individual title ownership, due to the approval of the relevant authorities of its earlier application for surrender of the five lands made in 2000, and the approval was only finally registered on 4 February 2008. The plaintiff then wrote to the directors of the company on 16 October 2008 and put the defendants to notice that the board of directors of the plaintiff were disturbed and concerned over its discovery of the status of the five lands. The plaintiff asked for an urgent meeting for the defendants to brief the plaintiff on the matter.

[37] Vide a letter dated 30 October 2008, D1 replied the plaintiff's letter and maintained that the assignment had been completed with reference to the PTGS letter dated 28 June 2006 where title searches were done at around that time. DW1 admitted in his cross-examination that the company and the defendants did not have the meeting as requested by the plaintiff.

[38] Despite knowing that the plaintiff had grievences against the company, the defendants went ahead and voluntarily wound up the company in 2010.

[39] D1 was the principal director for the company's accounts. From his evidence, it is clear that the major part of the monies paid by the plaintiff to the company, ie 93% of the full fees, had already been taken out from the company. From his evidence, it is also shown that the company was set up mainly for the purpose of undertaking the assignment given by the plaintiff. MAB has left the company and his shares were sold to D1. The defendant admitted that he is the principal shareholder of the company. He also admitted that at the end of 2008, he already knew that there were problems with the titles.

[40] Based on the totality of the evidence adduced, it is clear that D1 and/or MAB had made representations to the plaintiff that they would be able to recover the five lands and ensure that the said lands would be registered in the plaintiff's name.

[41] Counsel for the defendants submitted that there was no way that the defendants would have known about the plaintiff's previous application made in 2000 for the surrender of the five titles since such application was not endorsed on the register document of title although s 197(3) of the NLC mandates such endorsement. Moreover, s 198(4) of the NLC requires the land administrator to notify the proprietor of the approval of surrender. The evidence revealed that the relevant land office failed to comply with either s 197(3) or s 198(4) of the NLC.

[42] While it is true that there is no endorsement in the register of title of the five lands of the plaintiff's application for surrender of such lands and the approval thereof, the fact is that for as long as the surrender of the five titles was not registered by the relevant authorities before 4 February 2008, the five titles remain registered under the ownership and name of the plaintiff. This fact, or the truth of the matter, was not communicated to the plaintiff by the company and/or D1 and/or MAB.

[43] By the fact that the company, through MAB, sent to the plaintiff on 4 July 2006 the certified true copies of the five titles, which titles were still under the plaintiff's name (since it was prior to the registration of surrender of the five lands on 4 February 2008), it proves that D1 and/or MAB had taken advantage of the situation and misled or deceived the plaintiff into believing that they had fulfilled the assignment. Clearly, they are guilty of misrepresentation and fraud in equity and therefore liable to the plaintiff for collecting payment of full fees based on the assignment which had never been successfully undertaken, or had not been completed by the company and/or D1 and/or MAB in the first place. There is no doubt that D1 and MAB had acted together, in their capacity as directors and officers of the company, as the alter ego of the company, in all their dealings with the plaintiff regarding the assignment. The evidence shows that D1 and/or MAB were the controlling and directing minds of the company at the material time when such misrepresentation and fraud in equity were committed against the plaintiff.

[44] Going by the standard of proof beyond reasonable doubt, the court is satisfied that the plaintiff has adduced satisfactory cogent evidence of misrepresentation and fraud in equity by D1 and/or MAB. It certainly justifies the lifting of the corporate veil of the company in order to now make D1 liable for the losses suffered by the plaintiff, more so because the Directors have intentionally caused the company to be voluntarily wound up. It is immaterial that such winding up only commenced on 8 February 2010 (CBOD Pt B Vol 3 p 592), and took place some one year and four months after the plaintiff's letter of 16 October 2008 (CBOD Pt B Vol 2 pp 307–318). What is material is that D1 admitted in his cross-examination that 93% of the fees paid by the plaintiff were removed out from the company system before such winding up of the company, even though D1, as principal director and shareholder of the company, was notified of the plaintiff's letter of 16 October 2008 (CBOD Pt B Vol 2 pp 307–318). D1 should therefore know that there can be a possible claim instituted by the plaintiff since the defendants did not have the urgent meeting, as requested by the plaintiff, for the directors of the company to brief the plaintiff on the status of the five lands. From the letter, D1 was already informed by the plaintiff that its board of directors was very disturbed and concerned over the status of the five pieces of land.

[45] It is entirely within the plaintiff's discretion to decide whether to sue the defendants only, and not MAB. Just because MAB is not made a defendant in this case, it does not in any way cancel out D1's personal liability. The court further notes that D1 did not institute third party proceedings against MAB in this case.

[46] As for the plaintiff's cause of action based or constructive trust, the court is unable to agree that since the full sum of fees were paid to the company, the defendants are constructive trustees to the plaintiff who is the beneficiary of such monies. To my mind, that argument is rather artificial and too far-fetched, and cannot be accepted by this court. The evidence shows that the plaintiff paid the monies for the alleged successful undertaking of the assignment, and it is not a case of the defendants holding such payment or monies on trust for the plaintiff as beneficiary.

Total failure of consideration

[47] The court does not think that the plaintiff's claim based on the defendants' obligation to compensate the plaintiff for its losses for total failure of consideration can be allowed. This is because the contract for the assignment was entered between the plaintiff and the company, and not with the defendants. There is no privity of contract between the plaintiff and the defendants. As such, the plaintiff's claim cannot be based on the cause of action for total failure of consideration of the contract for the reason that there is no such contract entered between the plaintiff and the defendants.

Negligence

[48] Again, this claim by the plaintiff based on the cause of action for negligence cannot be allowed on the rationale that there is no privity of contract between the plaintiff and the defendants since the contract was entered between the plaintiff and the company. As such, the defendants do not owe a contractual duty of care to the plaintiff. Therefore, the question of breach of duty of care through negligence does not arise.

The plaintiff's claim for payment of quitment and assessment, etc for the five lands

[49] This claim cannot be allowed because for as long as the plaintiff remains as the registered owner of the five lands prior to the registration of the surrender of the five lands by the relevant authorities on 4 February 2008, as confirmed by the evidence of PW6, the deputy PTGS, the quit rent has to be paid. It follows that even the assessment has to be paid by the plaintiff, as owner, to the relevant authorities. In fact, PW6 explained that the delay in the cancellation of the registration of the plaintiff's name in the five titles in order to effect the surrender of the five lands pursuant to the plaintiff's application under the

NLC was because the plaintiff failed to pay the quit rent. Thus, on 28 June 2006, ie the date of the non-existent PTGS letter sent by MAB to the plaintiff, and later referred to by D1 (CBOD Pt B Vol 1 p 178) informing the plaintiff that the five lands were under the ownership of the plaintiff, the five titles continued to remain in the plaintiff's name since the cancellation of the five titles or surrender of the five lands could not be done until the quit rent was paid by the plaintiff. Therefore, it cannot be held that by MAB's advice and request to the plaintiff to pay the outstanding arrears of quit rent amounting to RM1,228,143.20 as at the year 2006, the defendants had precipitated the surrender of the five lands and had caused losses, ie the sums paid for the quit rent and assessment, to the plaintiff. In fact, the plaintiff, on its own, continued to pay quit rent amounting to RM330,731 for the years 2007–2008. The plaintiff also paid MPSJ the total sum of RM718,546.31 for the assessment for the year 2008 in relation to the five lands.

Claim for general damages

[50] There is no evidence adduced by the plaintiff that it had suffered any general damages as a result of the actions of the company and/or the defendants and/or MAB.

DECISION

[51] Going by the above considerations, the court orders as follows:

(1) the plaintiff's claim against D2 is dismissed. No order as to costs;

(2) the plaintiff's claim against D1 is allowed as follows:

(a) the sum of RM7,096,872.60; and

(b) interest at 5%pa on the sum in para 2(a) above from the date of filing of the writ of summons to the date of full realisation,

(3) the plaintiff's claim for consequential losses in para 47(ii)(a)–(f) of the SOC is dismissed;

(4) the plaintiff's claim for general damages is dismissed; and

(5) costs of RM20,000 are to be paid by D1 to the plaintiff.

Claim allowed in part.

Reported by Afiq Mohamad Noor